

INCOTERMS 2020 and INSURANCE

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INCOTERMS 2020

- Sales imposing the obligation to take out insurance: CIP and CIF
- CIP for any mode or modes of transport (multimodal)
- CIF for sea and inland water transport (only)

INCOTERMS 2020 CIP

Seller's Obligations A 5 (Insurance)

- Seller must obtain
- at its own cost
- Cargo insurance complying with the cover provided by ICC (A) or similar clauses as appropriate to the means of transport used.
- *Compliance with ICC (A) or similar clauses:*
 - *The scope of cover must not be narrower than ICC(A).*
 - *Otherwise (for example) Clauses 16.1 and 16.2 (duties imposed on the assured for minimising losses) or Clause 18 (duty to avoid delays) or Clause 19 (subjecting the insurance contract to English Law and practice) do not need to be incorporated*

INCOTERMS 2020 CIP

Seller's Obligations A 5 (Insurance)

- *ICC (A): Which edition (1982 or 2009)?*
- *2009 ICC (A) 19 "This insurance is subject to English law and practice". Is it a requirement to keep this choice of law?*
- *If yes MIA provisions and English "practice".*
- *Meaning of "practice": Customary law? Usages?*

INCOTERMS 2020 CIP

Seller's Obligations A 5 (Insurance)

- Insurers of good repute
- *Meaning? Having an “international good rating”?*
- *In cases where the benefit of reinsurances is assigned to the buyer, this condition may be left aside (if reinsurers have a good repute)*
- *Or similarly when the insured is entitled to claim directly from reinsurers of good repute on the basis of a “cut through clause”.*

INCOTERMS 2020 CIP

Seller's Obligations A 5 (Insurance)

- Insurance must entitle the buyer or any other person having an insurable interest in the goods to claim directly from the insurer.
- *The seller must take out an insurance to the benefit of third party (namely the buyer).*
- *Versicherung für fremde Rechnung = assurance pour le compte d'autrui*
- *The law may provide that under certain circumstances the policyholder (who took out insurance to cover the interest of another = the “assured” or “insured”) may nevertheless claim directly from the insurer.*
- *VVG § 45(2) and (3).*
- *This is what the INCOTERMS seemingly aimed to avoid.*

INCOTERMS 2020 CIP

Seller's Obligations A 5 (Insurance)

- *Insurance to whom it may benefit (assurance pour le compte de qui il appartiendra; Versicherung für Rechnung wen es angeht)*
- If the seller takes out insurance “warehouse to warehouse” to cover all the carriage and has an insurable interest in a part of it (**for instance from its premises to the port of loading**) this insurance may be an insurance “to whom it may benefit”
- In such a case for the portion of the carriage where the seller bears the risk *the seller will be deemed (also) an insured and entitled to claim (for loss or damage occurred within this portion).*

INCOTERMS 2020 CIP

Seller's Obligations A 5 (Insurance)

- Additional cover required by the buyer such as cover against war risks or other risks (strikes, lock-out, labour disturbances, riots, civil commotions, terror, loss or damage caused by political, ideological or religious motive)
- CIP B.5 (Buyer's Obligations) states that the buyer must provide any information necessary to that effect.
- The seller must take out (additional) insurance if the buyer provides necessary information. Costs must be borne by the seller. (*Cost included within the sale price or paid separately?*).

INCOTERMS 2020 CIP

Seller's obligations A 5 (Insurance)

- The insurance shall cover at a minimum the price provided in the contract plus ten per cent (110%).
- The insurance shall be in the currency of the contract
- *The price + ten per cent (110%):*
 - *100%= the price provided in the contract (cost + insurance+ freight)*
 - *Insured value at the port of loading: VVG § 136- commercial value at the beginning of the insurance when the goods are shipped + insurance premium + expenses incurred until the moment when goods are delivered to the carrier + freight definitely paid*
 - *10%= Expected profit? Replacement value?*
- *If the contract price is excessively high this will give rise to “over insurance” (the excess is not valid except in case of an agreed value policy).*
- *Agreed value?*

INCOTERMS 2020 CIP

Seller's obligations A 5 (Insurance)

- The insurance shall cover the goods from the point of delivery to **at least** the named place of destination
- *“Insurance complying with the cover provided by ICC (A) clause”*
- *ICC (A) provide warehouse to warehouse cover.*
- *But subject to the “insurable interest” clause. Therefore no need to buy insurance covering the carriage (if any) up to shipment point*

INCOTERMS 2020 CIP

Seller's obligations A 5 (Insurance)

- What if the destination country requires insurance cover to be purchased locally?
- *Fronting? Insurance taken out locally (in the destination country) by the seller?*
- *Discharge of the seller's obligation to take out insurance?*
- *Or obligation complied with if insurance has been taken in seller's country?*
- *Or better to contract CPT instead of CIP?*

INCOTERMS 2020 CIF

- *In CIF contracts the buyer's insurable interest (with regards to carriage) exists until the warehouse in cases where the warehouse is situated far from the named port of destination.*
- *But the seller is allowed to take out insurance only up to the named port of destination.*
- *Additional coverage (until inland warehouse) upon request of the buyer.*
- *Better to contract CIP suitable to multimodal carriage.*

INCOTERMS 2020 CIP

Seller's obligations A 5 (Insurance)

- The seller must provide the buyer with the insurance policy or certificate or any other evidence of insurance cover
- *The problem arises to know “when”? Together with delivery/transport documents (A6)?*

INCOTERMS 2020 CIP

Seller's obligations A 5 (Insurance)

- The seller must provide the buyer at the buyer's request, risk and cost, with information that the buyer needs to procure any additional insurance.
- *Provision of information in the possession of the seller (as in CPT A5)?*
- *Buyer's risk?*

INCOTERMS 2020 CIF

Seller's obligations A 5 (Insurance)

- Same rule as CIP except:
- *ICC (C)* (or similar)

The risk of loss or damage covered by insurance

- ICC(A) *all risks*
- ICC (C) *named perils*
- In all risks insurances the *burden of proof* (that the risk materialized does not fall within the scope of the cover) lies with the *insurer*.
- The policyholder (or the insured) must prove that the risk materialized is a carriage risk occurred within the time and geographical limits of the insurance contract.
- Thereafter the insurers –in order to escape liability- must prove that the risk is due to one or more *excepted cases*.

The loss or damage risk covered by insurance

- In *named perils* cover, the policyholder or the insured (as the case may be) has to demonstrate
- in addition to conformity to time and geographical limits
- that the loss resulted from one of the *perils mentioned in the insuring clause*.
- In CIF contracts, the buyer covered in accordance with ICC (C) must then prove that the cause of the loss or damage is one of the following
 - fire or explosion
 - vessel or craft being stranded grounded sunk or capsized
 - overturning or derailment of land conveyance
 - collision or contact of vessel craft or conveyance with any external object other than water
 - discharge of cargo at a port of distress,
 - general average sacrifice or jettison.

The loss or damage risk covered by insurance

- *In ICC (C)* after evidence is brought about one or more of the named perils, the burden of proof will shift and the insurer will have to demonstrate one of the **excepted cases** or a behaviour (for example a breach of duty) that **discharges** the insurer.

Confusions

- Turkish Court of Cassation ruling:
- In CIF or CIP contracts, the seller shall have an insurable interest until the sale price is paid (*the so-called seller's interest*)
- Therefore (in CIP and CIF sales) the seller (that has concluded the insurance *on its own behalf*) shall be entitled to claim from the insurer for losses or damages occurred during the carriage.
- (*This may be the case for example if the contract provides for payment “cash against documents” or “cash against goods”.*)
- *Widespread opinion that CAD or CAG clauses override the transfer of the risk clause in CIP/CIF.*

Confusions

The seller that has concluded an insurance on its own behalf is in breach of INCOTERMS (that require an insurance taken out to the benefit of the buyer)

The transfer of the risk to the buyer means

- If seller did receive the sale price, it shall not be required to return it (neither wholly nor partly) upon loss or damage during transit*
- If seller did not receive the sale price yet, it will still be entitled to claim it regardless of the loss or damage during transit*

Confusions

- *Therefore, legally speaking, the loss or damage during transit does not adversely affect the seller*
- *The risk of non payment of the sale price by the buyer (including non-payment as a result of delivery of the goods at destination not in sound condition or refusal of the goods) can and should be covered by a credit (trade receivables) insurance contract.*

Confusions

- Goods sold during transit:
- *If the insurance contract (or the law applicable to the insurance contract) provides that the acquirer of the goods will not benefit from insurance?*
- *Is such an insurance contract conform to INCOTERMS?*
- *A5: “... This insurance shall entitle the buyer, or any other person having an insurable interest in the goods to claim directly from the insurers”*
 - *But CIP A6 (subsection 2): “if agreed or customary, the (transport) document must also enable the buyer to sell the goods in transit by the transfer of the document or by notification to the carrier”.*
 - *CIF A6 (subsection 2): “...unless otherwise agreed...”*